

# **In the Supreme Court of the United States**

OCTOBER TERM, 1969

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No. 300

**JAMES TOOAHIMPAH TATE, ET AL., PETITIONERS**

**v.**

**WALTER J. HICKEL, SECRETARY OF THE INTERIOR,  
AND DORITA HIGH HORSE**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

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## **BRIEF FOR THE SECRETARY IN OPPOSITION**

### **OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. xxxii-xxxv) is reported at 407 F. 2d 394. The opinion of the district court (Pet. App. xix-xxix) is reported at 277 F. Supp. 464. The administrative decision, which became the Secretary of the Interior's final order (Pet. App. xiii-xviii), is not reported.

### **JURISDICTION**

The judgment of the court of appeals was filed on March 3, 1969, and a petition for rehearing was denied on April 8, 1969. The petition for a writ of certiorari was filed on June 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

## QUESTION PRESENTED

Whether the Secretary of the Interior's disapproval of the will of an Indian as specifically authorized by statute may be overturned by a court.

## STATUTE INVOLVED

The Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 373, provides:

Sec. 2. Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: \* \* \*.

## STATEMENT

George Chahsenah, a Comanche Indian, died leaving a restricted estate consisting of interests in three Comanche allotments (Pet. App. iii). Under a will dated March 14, 1963, George Chahsenah devised and bequeathed his estate to a niece and her three children, petitioners herein (Pet. App. xiv.) The will made no mention of the decedent's daughter, Dorita High Horse (Pet. App. xiv).

Dorita High Horse and others contested the testamentary capacity of the decedent because of his history of prolonged excessive drinking (Pet. App. iii-iv, xiv). After hearing conflicting evidence, the Bureau of Indian Affairs' hearing examiner approved the will, finding that the decedent was mentally competent when the will was made (Pet. App. v-vi). The examiner also found that Dorita High Horse was the illegitimate daughter of the decedent (Pet. App. ii-iii). In departmental proceedings, that approval was rescinded and the will disapproved (Pet. App. xviii). The Regional Solicitor, acting for the Secretary, found that the decedent had failed to discharge his responsibilities to his daughter during her childhood and that it would be "inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare by lending his approval to the decedent's will" (Pet. App. xvii). Petitioners then commenced this action, seeking to have the Secretary's decision set aside and the estate distributed in accordance with the terms of the will (Pet. App. xx). The judgment of the district court, ordering the Secretary to ap-

prove the will (Pet. App. xxx-xxxi), was reversed by the court of appeals, with directions to dismiss for lack of jurisdiction on the ground that, under Section 2 of the 1910 Act, *supra*, the departmental decision was not subject to judicial re-examination (Pet. App. xxxii-xxxv).

#### ARGUMENT

The decision below rests upon the explicit statutory authority and responsibility of the Secretary of the Interior to supervise the distribution of Indian estates pursuant to 25 U.S.C. 372-373. The court of appeals held that the Secretary's disapproval of the Indian will involved here may not be overturned by the courts. While the opinion reaffirms that court's previous holdings of nonreviewability in broad terms, the application of the principle in this case does not, as petitioners claim, conflict with decisions of the court of appeals for the District of Columbia Circuit. While, in *Homovich v. Chapman*, 191 F. 2d 761 (C.A. D.C.), that court expressed the view that the Secretary's actions under Section 373 are judicially reviewable in some instances (and to that extent apparently disagrees with the court below), the opinion expressly holds that when the Secretary's determination is "within the scope of the authority conferred upon him, the court cannot disturb his decision." *Id.* at 764. That rule, reiterated more recently in *Hayes v. Seaton*, 270 F. 2d 319 (C.A.D.C.),<sup>1</sup> would effectively preclude review here.

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<sup>1</sup> See, also, the *per curiam* order in *Asenap v. Huff*, 312 F. 2d 358 (C.A.D.C.), directing the district court to enter summary judgment in favor of the Secretary.

We question whether the scope of judicial authority to review determinations of the Secretary of the Interior under 25 U.S.C. 373 is a matter that presses for authoritative decision by this Court. The Court recently denied review of a similar decision by the court below, sustaining as nonreviewable the Secretary's approval of an Indian will under this statute. *Attocknie v. Udall*, 393 U.S. 833. At all events, the decision below is correct under any standard of reviewability and does not warrant further review.

#### CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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